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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

Arthur E. Lees,

- *Petitioner*,

v.

Secretary of Commerce,

Donald L. Evans,

- *Respondent*.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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9705

QUESTIONS PRESENTED

1. Whether, in the formation process of a federal procurement contract, the contracting officer is authorized to enter into a written contract by making an offer to the contractor that the contractor accepts, rather than by soliciting an offer from the contractor, and if the contracting officer is not authorized to do so, is the written contract void and unenforceable?

2. Whether, in the formation process of a federal procurement contract, the State Department contracting officer is authorized to sign a written Commerce Department contract for personal services at the Foreign Pay (FP) grade 5 level when State Department acquisition regulations expressly limit the contracting officer's authority to enter into personal services contracts to State Department only personal services contracts at the FP 9 and below level, and if the contracting officer is not authorized to do so, is the written Commerce Department personal services contract at the higher FP 5 level void and unenforceable?

3. Whether, in the formation process of a federal procurement contract, the State Department contracting officer is authorized to sign a written Commerce Department contract for personal services without an express delegation of authority issuing from the Commerce Department to the State Department, and if the contracting officer is not authorized to do so, is the written Commerce Department contract void and unenforceable?

4. Whether the phrase "employment... by contract for services" as used in The Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-32 (September 30, 1996) (providing annual

appropriations for the Department of Commerce for fiscal years 1997 and 1998 by continuing resolution) is equivalent in meaning to the phrase "acquisition of services by contract" as used in Federal Acquisition Regulation (FAR) 37.104(a) thereby specifically authorizing Commerce Department acquisition of personal services?

PARTIES

The Petitioner is Arthur Edward Lees.

The Respondent is the Department of Commerce by and through Donald L. Evans, in his official capacity as Secretary of Commerce.

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OPINIONS AND DECISIONS BELOW

The opinion of the Court of Appeals (App., 1a–7a) is unpublished (*Lees v. Evans*, 01-1549, 31 Fed. Appx. 680, (Fed. Cir. 2002)). The opinion of the Armed Services Board of Contract Appeals (App., 8a–26a) is unreported. The second decision of the Department of State Contracting Officer (App., 27a–32a) is unreported. The first decision of the Department of State Contracting Officer (App., 33a–34a) is unreported.

JURISDICTION

The judgement of the Court of Appeals was filed on February 15, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The jurisdiction of the Court of Appeals was invoked pursuant to section 8(g)(1) of the Contract Disputes Act of 1978 (41 U.S.C. 607(g)(1)) governing appeals from final decisions of the Armed Services Board of Contract Appeals (ASBCA). 28 U.S.C. § 1295(a)(10). The jurisdiction of the ASBCA was invoked pursuant to the Contract Disputes Act, 41 U.S.C. §§ 601 *et seq.*

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case raises issues involving procurement authority derived from the Department of Commerce's Appropriations Act for fiscal year 1998, the Federal Acquisition Regulations, and the Department of State Acquisition Regulations governing service contracting.

The relevant provisions of the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-32 (September 30, 1996) and the Continuing

Appropriations Act, 1998, Pub. L. No. 105-46, 111 Stat. 1153 (September 30, 1997) are set forth in the Appendix at 19a.

The relevant provisions of the Federal Acquisition Regulations are set forth in the Appendix at 2a, 18a-19a, 40a-46a, 50a.

The relevant State Department Acquisition Regulations are set forth in the Appendix at 50a-51a.

STATEMENT OF THE CASE

In 1982, Congress drafted the authorization language at issue in this case that has been used in the appropriations acts for the Commerce Department from fiscal year 1983 through 1998 to the present. (App. 15a, 19a-20a, 33a, 35a-37a, 54a-57a) The Federal Acquisition Regulations System was subsequently developed in 1985. (App. 40a) In September 1993, the State Department Procurement Executive delegated personal services contracting authority at overseas posts. The delegation prohibited the use of such authority on behalf of other agencies and limited the use to awards of State personal services contracts at the Foreign Service Officer (FSO) or Foreign Pay (FP) grade 9 equivalent level or below. This authorization was codified in the agency's acquisition regulations. (App. 50a)

Also in 1993, as a result of Congressional hiring limitations and budget constraints, the Commerce Department terminated its use of Part-Time, Intermittent and Temporary (PIT) federal employment positions at all American embassy and consulate U.S. and Foreign Commercial Service (US&FCS) offices worldwide. These former Commerce PIT positions, such as receptionists, secretaries, librarians, computer specialists, and commercial

representatives, were instead called personal service contractor (PSC) contracts. (App. 4a, 33a, 35a, 37a, 51a)

The State Department fills these Commerce PSC requirements utilizing personnel hiring procedures, i.e., publishing job vacancy announcements with two week application periods, receiving SF 171s or resumes, extending letters of appointment signed by State Department personnel officers for acceptance by applicants, completing Form JF-62 Personal Services Contracting Actions, and then having applicants sign a document identified as a Personal Services Contract that is also signed by a State Department personnel officer, contracting officer, and budget officer, that expressly declares, "... THE CONTRACTOR is NOT a direct-hire employee of the U.S. Government ....", e.g., Contract No. S-CH500-98-0004, that is the subject of this appeal. (App. 2a-5a, 9a-15a, 28a, 30a, 33a-34a, 35a-37a, 47a, 49a, 52a, 54a)

The State Department does not fill these Commerce PSC requirements utilizing procurement procedures set forth in the federal procurement statues and regulations, i.e., publishing a notice in the Commerce Business Daily for a minimum of two weeks of the pending release of a solicitation, followed by release of an invitation for bids (IFB) or request for proposals (RFP) allowing prospective offerors a minimum 30 day offer preparation period, followed by government acceptance of the offer and award of a contract; nor does the agency follow appropriate procedures to support a deviation from these requirements, e.g., Petitioner was never provided with a solicitation or opportunity to present an offer. (App. 4a-5a, 9a-10a, 22a)

In his initial September 8, 1998 claim, Petitioner, Arthur Lees, demanded the State Department contracting officer produce evidence of the officer's authority to sign PSC

Contract No. S-CH500-98-0004. "Pursuant to FAR 1.602-1(a) ('Information on the limits of the contracting officer's authority shall be readily available to the public and agency personnel.'), please fax me . . . information on the limits of your contracting authority." Mr. Lees testified in the claim:

> While I expressed to Bob Tansey my interest in competing for a PSC contract, I was never provided a solicitation. Not having an IFB or RFP, I was unable to respond with either a bid or a proposal. If there had been compliance with the applicable laws and regulations for dealing with me as a prospective contractor, I would have had the opportunity to submit a bid or proposal that could have included a cost package. Such a package would have been comparable to the benefits provided to direct hire employees, and would be considered reasonable under the standards set forth in the FAR.

In his final decision responding to Mr. Lees' claim that the Commerce Department never solicited an offer, the contracting officer repeatedly declared that "Contract No. S-CH500-98-0004 was established by the Government's offer and [Mr. Lees'] acceptance." (App. 29a-30a)

Although encouraged to remain on in his position beyond the September 1998 expiration of PSC Contract No. S-CH500-98-0004, Mr. Lees declined because he saw a valuable business opportunity. Mr. Lees had learned that there are many PSCs at U.S. embassies and consulates throughout the world. Mr. Lees wanted the opportunity to bid on some of these positions and offer his own personnel to fill the agency's requirements. Mr. Lees, therefore, requested solicitations for six PSC commercial representative positions located in Beijing, Shenyang,

Guangzhou, and Chengdu. The Commerce Department, however, refused to publish any invitations for bids (IFB) or requests for proposals (RFP). (App. 35a)

On September 30, 1998, Mr. Lees filed with the General Accounting Office (GAO) the first of five protests and four supplemental protests of the agency's failure to release solicitations for the six positions. Therein, Mr. Lees alleged, "[Petitioner] has expressed, and continues to express, his interest in having the opportunity to submit a bid or proposal in response to properly published solicitations of the protested PSC contracts. * * * The protested PSC contracts are being processed as employment actions, rather than procurement actions." (App. 37a)

As the GAO protests progressed in parallel with the processing of Mr. Lees' initial and amended claims, both parties incorporated the protest pleadings and GAO decisions into their pleadings before the ASBCA. There were seven GAO decisions with five entered into the ASBCA record. In the first four decisions, the GAO summarily declared (in footnotes) that these six PSC actions were procurement in nature, but dismissed Mr. Lees' protests under various GAO procurement procedural rules without compelling the Commerce Department to release any solicitations. In the last three decisions, the GAO instead declared (after extensive analysis) that these six PSC actions were actually employment in nature, dismissing Mr. Lees' protests as being outside of the GAO's bid protest authority.

Between the third and fourth GAO decisions (while the GAO was still holding that the agency's efforts constituted procurement actions), Mr. Lees filed his fourth protest relating to the agency's efforts to fill (now with two commercial representatives) the vacancy left by Mr. Lees in

Chengdu. In his January 28, 1999 protest, Mr. Lees alleged:

> The protester, Arthur Lees, submits this protest of the agency's efforts to obtain personal services by contract using employment procedures implemented by personnel officials rather than using acquisition procedures implemented by procurement officials. Such agency action fails to comply with applicable laws and regulations and is an abuse of discretion.
>
> . . . .
>
> The failure of the agency to synopsize its requirement in the CBD or to release a solicitation prevents the protester from adequately preparing a proposal. The protester cannot obtain commitments from individuals who can be offered in a proposal because there is not a normal procurement acquisition lead time (PALT) with a minimum of 45 days. A two week window is unreasonably restrictive. The agency's failure to notify the protester until after the two week application window closed is evidence of bad faith. It is not possible for the protester to find and hire individuals as his contractor's personnel on such short notice. Such conduct is unduly restrictive of full and open competition. (*Id.*, p. 10)

In its March 15, 1999 response to this protest of the follow-on Chengdu requirement, the agency for the first time clearly articulated its position that it intended these PSC commercial representative positions to be employment in nature, rather than procurement. (App. 52a-57a)

The GAO picked up on the agency's position and issued its decision denying the protests for lack of GAO bid protest authority over employment actions. (App. 35a-37a)

Following this GAO result concerning the follow-on Chengdu contracts, the agency included its "employment argument" in its pleadings before the ASBCA, moving for a similar dismissal of Mr. Lees' claims alleging that PSC Contract No. S-CH500-98-0004 was actually a common law employment contract and the ASBCA lacked authority to make a decision affecting employment actions. Instead, the ASBCA determined that PSC Contract No. S-CH500-98-0004 was actually procurement in nature, yet ruled that the agency was entitled to summary judgment as a matter of law. Upon Mr. Lees' appeal of the ASBCA's decision, the agency abandoned its common law employment argument and adopted the ASBCA's procurement analysis. The Court of Appeals noted the agency's flip flop (App. 6a-7a):

> Here, it appears that the government did not adopt its inconsistent position before the Board. Instead, it has changed its position only on appeal to this court, where it supports the Board's decision, which was based on a ground different from the position taken by either party before the Board. Because the Board, and not the government, introduced the issue as to whether Mr. Lees' contract was a procurement contract governed by FAR 37.104, the government is not estopped from arguing that the Board's decision, rejecting both parties' submissions to the Board, was correct.

Actually, Mr. Lees did take the position that the relationship between Mr. Lees and the agency was procurement in nature governed by the FAR. Mr. Lees contended that there existed an implied-in-fact procurement contract and that Contract No. S-CH500-98-0004 is unenforceable as an express procurement contract because the formation process was fatally defective in that the

Commerce Department never solicited and Mr. Lees never submitted an offer to the agency and the contracting officer lacked proper authority. The Court of Appeals acknowledged, but rejected Mr. Lees' implied-in-fact argument (App. 5a):

> In the alternative, Mr. Lees contends that the conduct of the parties evidences an implied-in-fact contract under which he should be compensated at the level of FSO grade 5, step 6, commensurate with the quality of services he provided. Having already concluded that there was an express, written, personal services contract between Mr. Lees and the government, we reject Mr. Lees' argument that there was an implied-in-fact contract covering the same subject matter. [citation omitted]

In his June 30, 2000, response to the motion for summary judgment, Mr. Lees articulated in detail his contention that 48 CFR 637.104-70 limited the contracting officer's authority for personal services contracts with U.S. citizens to State Department only personal services contracts at the FP 9 equivalent level or below. (App. 47a-51a)

Mr. Lees documented on page 53 of the appendix to his August 24, 2001 brief to the Court of Appeals that Mr. Lees, on September 30, 1999, sought discovery before the ASBCA of all evidence establishing a written delegation of authority from the Commerce Department to the State Department.

> 8. Extent of Authority Under ICASS. Access to all agency records articulating the extent of the State Department's authority under the ICASS system to process contract actions for the Commerce Department regarding personal services contracts

> performed in China. (DoS Answer ¶¶ 20, 36, 3, 39, and 96. "To the extent that Paragraph 10 of the Amended Complaint alleges that the Government acted without authority ... it is denied." "To the extent a response is necessary, the Government denies that the Board has jurisdiction of the Appellant's [sic]." "Paragraph 6 of the March 22, 1999 Complaint ... State officers awarded and administered Appellant's contract under the shared administrative services (ICASS) system....")

The Commerce Department, in its July 26, 2000 reply to Mr. Lees' response to the agency's motion for summary judgement, answered Mr. Lees' discovery request and declared:

> Finally, in response to . . . alleged deficiencies in the Government's document production, the Government reiterates that no documents relevant to the authorities under which the Government entered into the contract with Mr. Lees have been intentionally withheld from Appellant. A few documents, including the ICASS agreement in effect at Embassy Beijing when the Contract was executed, either do not exist or have not been located.

In his June 30, 2000 response to the agency's motion for summary judgment, at page 5, Mr. Lees summarized the parties' positions on the issue of the Congressional delegation of authority mandated in FAR 37.104(b).

> Both Appellant and Respondent agree that Congress did not intend the language of the appropriations act to grant Commerce the procurement authority contemplated by FAR 37.104(b). The Appellant first

> articulated his position on the issue of authority in a 19 November 1998 legal opinion responding to the GAO attorney's request for such during Appellant's first protest. [Footnote omitted] Commerce first articulated its position in a 15 March 1999 detailed memorandum of law submitted during Appellant's fourth protest (protesting the process used to fill Appellant's vacant Chengdu position). This "employment" position has been summarized in Respondent's 15 May 2000 Motion for Summary Judgment at p. 9.

Regarding the need for a delegation of authority from the Commerce Department to the Department of State and from the State Department Procurement Executive to the State contracting officer, the ASBCA found that "Mr. Yen was an authorized contracting officer for the Department of State, U.S. Embassy Beijing. He was authorized to enter into this contract on behalf of the Department of Commerce pursuant to 48 CFR 601.603-70(a)(1)(ii)." (App. 25a) The Court of Appeals did not directly address these two issues of the authority of the contracting officer, but did affirm the ASBCA's decision.

Mr. Lees also argued to the ASBCA that just as the original State Department contracting officer (Yen) lacked authority to create a legally enforceable written PSC contract, the subsequent State Department contracting officer (Smith) similarly lacked authority to render valid contracting officers final decisions on behalf of the Commerce Department. Mr. Lees declared, "This is a defect in Smith's decisions which Appellant argues should be grounds for sustaining Appellant's appeals based upon Smith's lack of authority." (App. 48a) Both the ASBCA and Court of Appeals ignored Mr. Lees' argument.

REASONS FOR GRANTING THE PETITION

I.

The Court Of Appeals Affirmed The ASBCA's Decision (That The Contracting Officer Was Authorized To Enter Into A Written Procurement Contract By Making An Offer To The Contractor) And That Decision Directly Conflicts With This Court's Decision In *Floyd* And Its Progeny Holding That A Contracting Officer's Authority Is Derived From The Federal Acquisition Regulations (That Prohibit The Contracting Officer From Awarding A Contract Without First Soliciting And Accepting An Offer From The Contractor) And That A Purported Contract That Does Not Comply With The Regulations Is Void As A Matter Of Law.

This Court articulated in *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, ___, 19 L. Ed. 169 (1868), that it is appropriate to scrutinize the basis for an officer's contracting authority. (App. 35a) A contracting officer is limited in his authority by the relevant law applicable to a specific contract, as well as by the scope of the delegation of authority received. This Court has long held that the Government can enter into a valid contract only through a government official properly authorized by law to award that particular contract, otherwise, the contract is void. *Floyd* (App. 38a), contract unenforceable as not within scope of official's statutory authority; *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380 (1947), extending *Floyd* to contract unenforceable as not within scope of official's authority derived from agency regulations. FAR 1.602-1 declares, "Contracting officers may bind the Government only to the extent of the authority delegated to them." (App. 40a)

The record shows that State Department contracting officers have regularly signed Commerce Department PSC contracts like Contract No. S-CH500-98-0004 from 1993 through 1998 for positions classified as being above the FP 9 equivalent level. Apparently, Mr. Lees is the first person to object to this practice, perhaps because it routinely occurs at American embassies and consulates outside the United States far from the scrutiny of the courts. "An unauthorized and illegal practice prevailing among officers of the Government, no matter how long continued, can never ripen into a binding usage. *Peirce v. United States*, 1 Ct. Cls. 270; *The Floyd Acceptances*, 7 Wall. 666; *Houghton v. Payne*, 194 U.S. 88." *Luckenbach Steamship Co., v. United States*, 280 U.S. 173, ___; 50 S.Ct. 148; 74 L.Ed. 356 (1930).

Contract No. S-CH500-98-0004 is a contract for services governed by the FAR. (FAR 2.101 "*Acquisition*", App. 38a; FAR 37.101 "*Service Contract*", App. 42a; FAR 37.000, App. 41a) The FAR withheld authority from the contracting officer to enter into Contract No. S-CH500-98-0004 because he failed to ensure that all requirements of the FAR were satisfied. (FAR 1.602-1, App. 37a; FAR 2.101 "*Shall*", App. 42a) The FAR mandated that a contract for commercial representative services at the American Consulate in Chengdu be awarded through sealed bidding. (FAR 37.105, App. 42a) Sealed bidding required the contracting officer to solicit and receive a bid from Mr. Lees before the contracting officer was authorized by law to award Contract No. S-CH500-98-0004. (FAR 6.401, App. 39a; FAR 14.103-2, App. 40a)

This Court declared in *PanAm v. United States*, 273 U.S. 456, ___; 47 S. Ct. 416; 71 L. Ed. 734 (1927):

The contracts of April 25 and December 11, 1922,

> were not made by advertisement and competitive bidding, as required by law. Rev. Stats. 3709; *United States* v. *Purcell Co.,* 249 U.S. 313; *United States* v. *Ellicott,* 223 U.S. 524. The Act of June 4, 1920, did not repeal or supersede prior general statutes on fuel depots, competitive bidding, Government contracts, and the sale of Government property. See *Gt. Nor. Ry.* v. *United States,* 208 U.S. 452; *Erie Coal Corp.* v. *United States,* 266 U.S. 518; *United States* v. *Barnes,* 222 U.S. 513; *Robertson* v. *Labor Board,* 268 U.S. 619; [*48] *In re East River Co.,* 266 U.S. 355; *United States* v. *Sweet,* 245 U.S. 563; *Panama R.R. Co.* v. *Johnson,* 264 U.S. 375; *United States* v. *Greathouse,* 166 U.S. 601; *Ex parte Webb, 225 U.S. 663; Washington* v. *Miller,* 235 U.S. 422; *Bookbinder* v. *United States,* 287 Fed. 790; *Witte* v. *Shelton,* 240 Fed. 265; *United States* v. *Noce,* 268 U.S. 613.

The FAR required that the offer could only originate from Mr. Lees in order to create an enforceable procurement contract. (FAR 2.101 "*Offer*", App. 38a) Both the ASBCA and the Court of Appeals found as an undisputed fact that the contracting officer never solicited or received an offer from Mr. Lees and never received authorization to deviate from this FAR requirement. (App. 4a, 8a) Instead, the ASBCA and the Court of Appeals held that "*Promac, Inc. v. West*, 203 F.3d 786, 789 (Fed. Cir. 2000) (finding a bidder not entitled to equitable relief of reformation where it benefited from and participated in challenged procurement process)" estopped Mr. Lees from objecting to the Commerce Department's violation of this mandatory requirement. (App. 5a, 20a) Mr. Lees argued to the Court of Appeals:

> Courts of equity apply the maxim requiring clean hands only where some unconscionable act of the one

> seeking relief has immediate and necessary relations to the equity sought. *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 246 (1933). Mr. Lees committed no unconscionable act. The board erred in not making a reasonable factual inference in favor of Mr. Lees. Commerce is wrong in alleging Mr. Lees failed to rebut the applicability of *Promac, Inc. v. West*, 203 F.3d 786 (Fed. Cir. 2000). Mr. Lees clearly showed that *Promac* is inapplicable on its facts. In *Promac*, the Government published a solicitation and Promac submitted a bid. That is procurement. In the instant case, Commerce did not publish a solicitation and Mr. Lees did not submit a bid. Commerce made an offer Mr. Lees accepted. That is employment. It is understandable that Promac should live with the offer it made. Forcing Mr. Lees to live with Commerce's offered terms in an unlawful common law employment contract is an entirely different factual situation.

Mr. Lees contends in this petition that the Court of Appeals erred in failing to distinguish *Promac* on its facts. Promac made an offer that the agency accepted, forming a valid enforceable contract at law. Promac then came back and sought in equity to reform the valid contract and the court held that Promac was estopped because he benefited from the opportunity to make the original offer. Mr. Lees, on the other hand, did not have an opportunity to make an offer. There was no mandated procurement process from which Mr. Lees could benefit and, therefore, Contract No. S-CH500-98-0004 should be held unenforceable as a matter of law.

Mr. Lees is not seeking reformation of the void contract, but rather he is seeking to enforce the separate prior in time

implied-in-fact contract created by the conduct of Mr. Lees and the Commerce Department. *See*, *Algonac Mfg. Co. v. United States*, 428 F.2d 1241, 1255 (Ct. Cl. 1970) (Recovery may be had on an implied-in-fact contract when such ground is pleaded in the alternative.) Mr. Lees contends that estoppel as an equitable doctrine should not blind the court to the formation defects that make Contract No. S-CH500-98-0004 void as a matter of law.

The record shows that there is a wide and material disparity between the Commerce Department's authorization cable and the two offers made by the State Department personnel officer and contracting officer. The Commerce Department's intended term of service was for a base year plus four option years versus the personnel officer's minimum one year offer versus the nine months in Contract No. S-CH500-98-0004. The Commerce Department estimated annualized costs at $38,000 versus the personnel officer's offer of $30,751 annually versus the even lower $14.73 per hour rate for only nine months under Contract No. S-CH500-98-0004. Mr. Lees filed his claims seeking the fair market value of the implied-in-fact contract and contends that *Promac* cannot create an enforceable contract that *Floyd* and its progeny say is void. This Court articulated in *Floyd* (35a-36a) that if the official lacked authority to form an express contract, the actions of the other party are immaterial. The ASBCA's decision and the concurrence of the Court of Appeals directly conflict with the Supreme Court's holding in *Floyd* and its progeny.

This Court should take this opportunity to address this very important issue concerning an offer in an employment context and an offer in a personal services procurement context as such impacts upon an agency official's authority.

II.

The Court Of Appeals Affirmed The ASBCA's Decision (That A State Department Contracting Officer Was Authorized To Enter Into A Commerce Department Written Personal Services Contract At The FP 5 Level) And That Decision Directly Conflicts With This Court's Decision In *Floyd* And Its Progeny Holding That The Contracting Officer's Authority Is Derived From The Department Of State Acquisition Regulations (That Prohibit The Contracting Officer From Awarding A Contract On Behalf Of The Commerce Department At The FP 5 Level) And That A Purported Contract That Does Not Comply With The Regulations Is Void As A Matter Of Law.

Mr. Lees contends that 48 CFR 637.104-70 controls the extent of authority a State Department contracting officer may exercise when dealing with a personal services contract. (App. 50a-51a) Respondent argued, and the ASBCA and Court of Appeals agreed, that 48 CFR 601.603-70(a)(1)(ii) controls. The policy in federal acquisition law is that "[n]on-personal service contracts are proper under general contracting authority." (FAR 37.102(d), App. 42a) Authority for personal service contracts, however, is much more restrictive because of the potential for abuse. (FAR 37.104(a)&(b), App. 16a-17a) Respondent's reference correlates with the general contracting policy favoring non-personal services. Mr. Lees' reference, as depicted in its numbering and location within the agency regulation, shows that it expressly controls the factual situation of Mr. Lees' relationship with the Commerce Department.

The Commerce Department had already begun accepting Mr. Lees' performance on the morning of December 17, 1997, and by the conduct of the parties, a prior-in-time

implied-in-fact contract was created. Subsequently, the State contracting officer sought to create a written personal services contract on behalf of the Commerce Department for the position properly classified at the FSO grade 5 step 6 equivalent level. The State Department regulations, however, expressly forbid the award of a PSC contract at that level, withholding authority from the contracting officer. (App. 50a-51a) The contracting officer's act was unauthorized. Mr. Lees contends that the contracting officer's signature was null and void and totally ineffectual in creating an enforceable contract.

This Court articulated in *Floyd* (35a-36a) that if the official lacked authority to form an express contract, the actions of the other party are immaterial. This Court declared in *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380, ___; 68 S. Ct. 1; 92 L. Ed. 10 (1947):

> The scope of this authority may be explicitly defined by Congress or be limited by delegated [*7] legislation, properly exercised through the rule-making power. And this is so even though, as here, the agent himself may have been unaware of the limitations upon his authority. *See*, e. g., *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409; *United States v. Stewart*, 311 U.S. 60, 70, and *see*, generally, *The Floyd Acceptances*, 7 Wall. 666.

The ASBCA's decision and the concurrence of the Court of Appeals directly conflict with the Supreme Court's holding in *Floyd* and its progeny. This Court should take this opportunity to address this very important issue dealing with vindication of an agency's regulatory limits upon the authority of that agency's officials.

III.

The Court Of Appeals Affirmed The ASBCA's Decision (That A State Department Contracting Officer Was Authorized To Enter Into A Commerce Department Contract, Even Though The Record Shows No Express Delegation Of Authority Issuing From The Commerce Department To The State Department) And That Decision Directly Conflicts With This Court's Decision In *Floyd* And Its Progeny, Holding That A Contracting Officer's Authority Is Derived From The Top Down, And Not From The Bottom Up (So When The Commerce Department Has Not Expressly Delegated Its Authority Down To The State Department, The State Contracting Officer Is Prohibited From Awarding A Contract On Behalf Of The Commerce Department) And That A Purported Contract Without A Valid Delegation of Authority Is Void As A Matter Of Law.

These Commerce Department PSC contracts go on as before. Furthermore, the U.S. government is contracting out more and more services and U.S. military contractors are increasing on the battlefields worldwide, far from the U.S. military contracting officers, but close to State Department contracting officers at American embassies and consulates. The issue of the authority of State Department contracting officers to award contracts on behalf of other agencies needs to be decided with clarity and finality. Inadequate guidance will serve only to invite and prolong needless litigation.

Originally, the Commerce Department alleged that it delegated its authority to the State Department via a written ICASS agreement. When Mr. Lees requested the agreement during discovery, the Commerce Department admitted no ICASS or any other written agreement exists. Respondent

then resorted to alleging that 48 CFR 601.603-70(a)(1)(ii) provided the requisite delegation of authority, and the ASBCA and Court of Appeals agreed. Mr. Lees contends that 48 CFR 601.603-70(a)(1)(ii) is incapable of delegating authority from the Commerce Department to the State Department because it is a State Department regulation. It does not pass authority down, but rather, would have to reach up and take the authority from the Commerce Department. Mr. Lees asserts that the fallacy of the ASBCA's premise is obvious.

This Court articulated in *Floyd* and its progeny that derived authority must pass from greater to lessor in an obvious manner. If there is a break in the delegation chain of authority, the official lower in the delegation chain lacks authority to form an express contract, and the actions of the outside party are immaterial. The ASBCA's decision and the concurrence of the Court of Appeals directly conflict with the Supreme Court's holding in *Floyd* and its progeny. This Court should exercise jurisdiction to decide this very important issue concerning the delegation of authority from one agency to another.

IV.

The Court Of Appeals Affirmed The ASBCA's Decision, That The Phrase "Employment... By Contract For Services" As Used In The Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-32 (September 30, 1996) (Providing Annual Appropriations For The Department Of Commerce For Fiscal Years 1997 And 1998 By Continuing Resolution) Is Equivalent In Meaning To The Phrase "Acquisition Of Services By Contract" As Used In Federal Acquisition Regulation 37.104(a), And That Decision Directly Conflicts With Three Recent Decisions

From The General Accounting Office On Identical Facts, But The Court Of Appeals Decision Is Expressly "Not Citable As Precedent" So The Conflict Between The Three Competing Jurisdictions (Executive – Boards, Legislative – GAO, Judicial - Courts) On This Foundational Issue Is Unresolved.

Mr. Lees contends that the reasoned analysis of the Respondent (App. 52a-57a) and the GAO (App. 35a-37a), taking into account the legislative history of the act and conducting a linguistic analysis of the language of the act, the regulations, and case law, is correct. The ASBCA's cursory declaration that it disagreed with the GAO's decision was both in error and woefully inadequate, lacking any meaningful analysis. If the GAO is correct, the Commerce Department lacked the requisite delegation of authority from Congress to enable it to enter into all these personal services contracts at embassies and consulates worldwide.

If the Commerce Department did not possess authority for personal services contracts that it could delegate to the State Department, the State Department procurement executive lacked any authority to delegate to the contracting officers who signed Contract No. S-CH500-98-0004 or issued the final decisions spawning these appeals. The signature of the contracting officer is of no effect and Contract No. S-CH500-98-0004 is unenforceable as a matter of law. Similarly, the contracting officer's final decisions should be of no effect.

Practically, neither the ASBCA nor the GAO are required to follow the other's decisions. The Court of Appeals expressly stated its decision shall not be cited as precedent, so confusion and conflict remains. Contractors need clear guidance to avoid the problems and the extended

litigation Mr. Lees has encountered as the result of the constant flip flopping exhibited to date by both the agencies and the dispute resolution forums. Should a contractor docket a similar case in the future with the GAO (legislative), ASBCA (executive) or Court of Federal Claims (judicial), there is no clear precedent that any is required to follow. Whether Congress delegated personal services contracting authority to the Commerce Department is still open to debate.

The record before the Court of Appeals shows that, beginning with his first claim, Mr. Lees raised the issue of the authority of the State Department contracting officer to sign PSC Contract No. S-CH500-98-0004, in the following four contexts. (1) The FAR requirement that the contracting officer solicit Mr. Lees' offer. (2) The Department of State Acquisition Regulations (48 CFR Chapter 6) withheld from State contracting officers the authority to enter into contracts with other agencies for personal services, especially for services above the FP 9 equivalent level. (3) The record before the ASBCA contained no delegation of authority from the Commerce Department to the State Department. (4) The FAR required that the Commerce Department receive a delegation of authority from Congress before entering into personal services contracts. Each of these foundational issues concerning authority in federal procurement law was raised by Mr. Lees on the record before the ASBCA issued its decision. The question of authority is of great importance in the administration of federal procurement and employment contracts.

The executive, legislative, and judicial jurisdictions are split on this issue, thereby requiring intervention by this court to clarify this issue and to bring uniformity to all dispute resolution forums with jurisdiction over procurement actions.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Arthur Edward Lees, Esq.
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APPENDIX A

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. This disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

01-1549

ARTHUR E. LEES,

Appellant,

v.

Donald L. Evans, SECRETARY OF COMMERCE,

Appellee.

DECIDED: February 15, 2002,

Before MAYER, *Chief Judge*, BRYSON, and DYK, *Circuit Judges*.

PER CURIAM.

Arthur E. Lees appeals from a decision of the Armed Services Board of Contract Appeals granting summary judgment in favor of the government on his consolidated

appeals seeking rescission or reformation of his contract with the Department of Commerce. Because we conclude that the Board made no legal error, we *affirm*.

Mr. Lees contends that the Board erred in concluding that the government employed him pursuant to a procurement contract rather than through appointment under the civil service laws. We disagree. The FAR provision covering personal service contracts, FAR 37.104(a), recognizes two methods by which the government can obtain personal services: (1) "by direct hire under competitive appointment or other procedures required by the civil service laws," or (2) by procurement under a FAR 37.104 personal services contract. "Personal services contract" is defined in FAR 37.101 as "a contract that, by its express terms or as administered, makes the contractor personnel appear, in effect, Government employees." FAR 37.104(a) recognizes that the personal services contract creates an "employer-employee" relationship.

The contract between Mr. Lees and the government makes clear that Mr. Lees entered into a personal services procurement contract. On the front page of the contract, prominently displayed in the middle of the page, was the statement "THE CONTRACTOR is NOT a direct-hire employee of the U.S. Government" (emphasis in original). The contract states that the period of performance was from December 15, 1997, to September 30, 1998. The "Health Insurance" provision of the contract drew the following distinction between the "contractor" and "direct-hire personnel": "The contractor shall be provided a maximum contribution of up to 50% against the actual costs of annual health insurance costs, provided that such costs may not exceed the maximum U.S. Government contribution for direct-hire personnel." The "Social Services" clause of the

contract stated that "contract employees are to be considered as employees for the purposes of any . . . law of general applicability to an employer and employee." The "Disputes" clause made the contract subject to the Contract Disputes Act. Those contractual provisions all indicate that Mr. Lees was employed under a FAR 37.104 personal services contract and not by appointment under the civil service laws.

With respect to the JF-62 form that was issued at the outset of Mr. Lees' employment, we agree with Mr. Lees that the Board was imprecise in stating that the form identified Mr. Lees "as a 'contractor,' not an employee." The words "contractor" and "employee" both appear in the JF-62 form. The mere appearance of the word "employee" on the JF-62 form, however, does not indicate that Mr. Lees was appointed to a federal position under the civil service laws. To the contrary, the use of the term "employee" is consistent with the statement in FAR 37.104(a) that a personal services contract creates an "employer-employee relationship." In addition, the JF-62 form provided that Mr. Lees' employment term would expire on a particular date--September 30, 1998--which is indicative of a personal services contract, not an appointment under the civil service laws.

Mr. Lees contends that the two letters he received from the U.S. Embassy on November 24, 1997, indicate that the personnel officer intended her actions to constitute an appointment of Mr. Lees as a federal employee under the civil service laws. We disagree. To be considered a civil service appointed employee, an individual must satisfy all three of the criteria set forth in 5 U.S.C. § 2105: being appointed to a civil service position by a designated official; engaging in the performance of a federal function; and being subject to the supervision of a named federal official. *Horner v. Acosta*, 803 F.2d 687, 691 (Fed. Cir. 1986). All

three elements have independent significance and are strictly applied. *Id.* Mr. Lees' argument that he was employed under the civil service laws fails because he cannot satisfy the first criteria: appointment by a designated official.

Appointment is a discrete act that occurs when the last act to be done by the appointing authority is performed. *Skalafuris v. United States*, 683 F.2d 383, 386 & n.12 (Ct. Cl. 1982). The completion of an SF-50 or SF-52 personnel form is an important factor in determining whether an appointment has occurred. *Id.* at 387. In this case, the two letters Mr. Lees received from the U.S. Embassy cannot be said to "appoint" him to a federal position or offer him an appointment for his acceptance. In fact, the Commercial Service PIT/PSC Hiring Check List submitted in Mr. Lees' appendix makes clear that issuance of a JF-62 form is used to distinguish employment under a personal services contract from appointments to part-time intermittent or temporary employment positions, which are confirmed by the use of an SF-52 form.

Mr. Lees contends that his employment must have been pursuant to appointment because the government lacked statutory authority to obtain his services by personal services contract. Again, we disagree. FAR 37.104(b) provides that "agencies shall not award personal services contracts unless specifically authorized by statute." We agree with the Board that the ITA appropriations legislation for fiscal years 1997 and 1998, which authorizes "employment of Americans and aliens by contracts for services," provided statutory authority for the award of Mr. Lees' personal services contract in accordance with FAR 37.104(b).

Mr. Lees contends that his contract should be rescinded by reason of illegality because the government failed to

comply with certain FAR contract formation requirements. The Board found that the government did not publicize the proposed contract action in the Commerce Business Daily or as otherwise provided by regulation; it did not use sealed bidding or competitive proposals to solicit Mr. Lees' services; and it did not follow the appropriate procedures to support a deviation from these requirements. The Board further found, however, that Mr. Lees participated in and benefited from the defective acquisition process to which he now objects, and that he cannot now claim to benefit from the defects in the process that led to his employment. We agree with the Board's analysis. The FAR provisions to which Mr. Lees points are those designed to promote competition in the contract award contest. As the contract awardee, Mr. Lees was not prejudiced by the violation of those provisions. Accordingly, the Board did not err in concluding that Mr. Lees cannot invoke those provisions in support of his argument that he must be regarded as an appointee because his contract was unlawfully procured and thus must be rescinded or reformed. *See Promac, Inc. v. West*, 203 F.3d 786, 789 (Fed. Cir. 2000) (finding a bidder not entitled to equitable relief of reformation where it benefited from and participated in challenged procurement process).

In the alternative, Mr. Lees contends that the conduct of the parties evidences an implied-in-fact contract under which he should be compensated at the level of FSO grade 5, step 6, commensurate with the quality of services he provided. Having already concluded that there was an express, written, personal services contract between Mr. Lees and the government, we reject Mr. Lees' argument that there was an implied-in-fact contract covering the same subject matter. *See Algonac Mfg. Co. v. United States*, 428 F.2d 1241, 1255 (Ct. Cl. 1970).

Finally, Mr. Lees contends that the government should be judicially estopped from arguing that he was a contract employee because that argument is inconsistent with arguments the government made in earlier proceedings. Prior to this litigation, the Department of Commerce opposed protests filed by Mr. Lees before the GAO with respect to the Department's subsequent efforts to fill commercial representative positions at the U.S. Embassy in Beijing and at the U.S. Consulates in Chengdu and Shenyang. In those proceedings, the Department of Commerce successfully argued that GAO lacked bid protest authority because the protested actions were employment contracts rather than procurements governed by the FAR. GAO dismissed Mr. Lees' protests on the grounds that the authorizing statutory language envisioned employment actions under federal employment laws rather than personal service contracts under the FAR. In its brief to this court, however, the government now argues that the Board was correct to conclude that Mr. Lees was employed under a personal services procurement contract in accordance with FAR 37.104.

The doctrine of judicial estoppel provides that when a party successfully urges a particular position in a legal proceeding, it is estopped from taking a contrary position in a subsequent proceeding where its interests have changed. *Davis v. Wakelee*, 156 U.S. 680, 689 (1895). Judicial estoppel is designed to prevent the perversion of the judicial process and, as such, is intended to protect the courts rather than the litigants. *Data Gen. Corp. v. Johnson*, 78 F.3d 1556, 1564 (Fed.Cir.1996). Here, it appears that the government did not adopt its inconsistent position before the Board. Instead, it has changed its position only on appeal to this court, where it supports the Board's decision, which was

based on a ground different from the position taken by either party before the Board. Because the Board, and not the government, introduced the issue as to whether Mr. Lees' contract was a procurement contract governed by FAR 37.104, the government is not estopped from arguing that the Board's decision, rejecting both parties' submissions to the Board, was correct. In any event, it is our responsibility to review the Board's decision independently of the position taken by either party before the Board, and exercising that responsibility we conclude that the Board's decision must be upheld.

APPENDIX B

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Arthur E. Lees	)	ASBCA Nos. 52040, 52207
	)	
Under Contract No. S-CH500-98-0004	)	
	)	

APPEARANCE FOR THE APPELLANT:	Arthur Edward Lees, Esq. Pro Se
APPEARANCE FOR THE GOVERNMENT:	Dennis J. Gallagher, Esq. Trial Attorney Department of State Washington, DC

OPINION BY ADMIMSTRATIVE JUDGE DELMAN ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

Under these appeals, Mr. Arthur E. Lees (appellant) seeks to rescind or reform his contract with the United States and Foreign Commercial Service (US&FCS) of the International Trade Administration (ITA), Department of Commerce. This contract was to perform commercial related personal services for the American Consulate in Chengdu, China in 1997-1998. The Government has filed a motion for summary judgment, contending that it is entitled to judgment as a matter of law. Appellant has filed in

opposition to the motion.[1] For reasons stated below, we grant the Government's motion.

FINDINGS OF FACT

1. During 1997, the American Consulate in Chengdu, China was in need of a person to provide personal, commercial related services in China to further the mission of the consulate. The Consulate obtained authorization to hire a person under a personal services contract by telegram dated 31 July 1997. Said telegram stated, in pertinent part, as follows (app. R4 supp., 52040, tab 6, ex. J):

> US&FCS Chengdu is authorized to hire a commercial representative under a personal services contract at grade FP 5/6. . . . Execution of the contract, to begin on or about August 1, 1997 and carry over to the same date in 1998, is subject to the availability of funds. Annualized costs will be approximately USD 38,000. This contract may be renewed annually for up to five years, again subject to the availability of funds.

2. Appellant, an attorney and former employee of the Department of the Army, was in country in late 1997, seeking professional growth and studying Mandarin Chinese at Southwest Jiaotong University in Chengdu.

3. In September 1997 appellant visited the Consulate and met Mr. Robert Tansey, Commercial Officer. Mr. Tansey requested and received appellant's resume. In October 1997 Mr. Tansey contacted appellant and explained the Government's needs, and provided him with a copy of a vacancy announcement. The Government does not dispute,

and we find that it did not publicize a proposed contract action in the Commerce Business Daily or as otherwise provided by regulation, *see generally* FAR 5.1, 5.2, nor did it use sealed bidding or competitive proposals to solicit appellant's services, *see* FAR 37.105, 6.401, nor does it appear that the Government followed any regulation to support a deviation from these procedures.

4. Appellant expressed interest in working with the Consulate, and the Government sought to engage his services. By letter to appellant dated 21 November 1997, the U.S. Embassy personnel officer in Beijing advised appellant as follows (R4, 52207, tab 6):

> I am pleased to inform you that you have been selected to fill the Commercial Representative position for the American Consulate in Chengdu. You will be appointed at an annual salary of $30,751. Please be aware that this appointment, like all appointments at the American Consulate, is temporary and may be terminated at any time.
>
> *The Consulate does not provide housing or health benefits with this position* as it is considered a local hire position. Social Security and Taxes will be withheld from your salary. Should you have any questions please call me. Congratulations on being selected to the position and we look forward to working with you.
>
> Please indicate below your acceptance of this position and return the memo to Personnel. (Emphasis added)

Appellant accepted the Government's terms by signing and dating the letter on 24 November 1997 and returning it to the Government.

5. By telegram to the Department of Commerce, Washington, DC dated 27 November 1997, the U.S. Embassy "request[ed] approval of personal services contract for new FCS Chengdu commercial representative, Arthur Edward Lees". Authorization was granted by telegram dated 4 December 1997 (R4, 52207, tab 12).

6. On 17 December 1997, appellant executed a contract entitled "Personal Services Contract Between the U.S. Department of Commerce and Arthur E. Lees." Mr. Michael Yen, Contracting Officer, signed on behalf of the Government,[2] as did the Embassy's personnel officer and the budget and fiscal officer. The period of performance was from 15 December 1997 to 30 September 1998. The services to be provided were stated as follows (R4, 52207, tab 15):

> The Contractor will provide the following types of services in the execution of his/her duties:
>
> Working directly under the Commercial Officer, incumbent performs, in effect, the duties of a junior FCS Officer. Incumbent produces alert market reports on trade, investing and licensing opportunities in China. Incumbent contributes to post production of Industry Sub-sector Analyses, Trade Opportunity Reports, Comparison Shopping Services and other standard FCS information products. Incumbent counsel [sic] U.S. companies on doing business and assists U.S. companies involved in trade disputes

> with Chinese organizations. Incumbent counsels Chinese organizations seeking to import U.S. products and helps facilitate Chinese [sic] buying missions to the U.S. and participates in mission trade promotion activities. Incumbent serves as FCS staff contact with Chinese officials and U.S. company representatives for working group meetings. As required, incumbent undertakes special projects assigned by the Commercial Officer.

The contracting officer also executed a JF-62, Personal Services Contracting Action, on 18 December 1997. This form provided that the subject contracting action was an "Appointment under Personal Services Contract" (*id.*, tab 16). Appellant was identified as a "contractor", not an employee. A copy of the form was to be provided to appellant.

7. On the front page of appellant's contract, prominently displayed in the middle of the page above the signatures, was the following statement (R4, 52207, tab 15):

> . . . THE CONTRACTOR is NOT a direct-hire employee of the U.S. Government . . . . (Emphasis in original)

8. We also find the following contract clauses pertinent:

CLAUSE IV. ESTIMATED COST

> The estimated cost of this Contract, exclusive of travel, for satisfactory actual work performed under this contract will be calculated at a rate of USD 14.73 per hour . . . .

. . . .

E. Health Insurance. The contractor shall be provided a maximum contribution of up to 50% against the actual costs of annual health insurance costs, provided that such costs may not exceed the maximum U.S. Government contribution for direct-hire personnel.

. . . .

CLAUSE X. SOCIAL SERVICES

Contract employees are to be considered as employees for the purposes of any United States or foreign law of general applicability to an employer and employee. Personal Services Contractors who are U.S. citizens or resident aliens shall have deducted from their pay F.I.C.A. (Social Security) contributions and U.S. federal income tax withholding in accordance with the regulations and rulings of the Social Security Administration and the Internal Revenue Service. . . .

. . . .

CLAUSE XII. DISPUTES

This Contract is subject to the Contract Disputes Act of 1978 (41 USC 601-613 The Act). Except as provided in the Act, all disputes arising under or relating to this Contract shall be resolved by submitting a claim, in writing, from either party to

the Contracting Officer for a written decision. The Contracting officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.

. . . .

CLAUSE XVI. AVAILABILITY OF FUNDS

The Government's obligation under this contract is contingent upon the availability of appropriated funds from which payment for Contract purposes can be made. No legal liability on the part of the Government for any payment may arise until funds are made available to the Contracting Officer in this Contract and until the contractor receives notice of such availability, to be confirmed in writing by the Contracting Officer.

The Government did not include an options clause in appellant's contract. Appellant does not allege in its claims that any authorized Government contracting agent represented to him that such a clause would be included in his contract or that the Government would renew appellant's contract.

9. It appears that during the performance of the contract there arose a number of disputes as to appellant's remuneration and the renewal of the contract. By memorandum dated 8 September 1998, appellant sought a contracting officer's decision under the Disputes clause of his contract, seeking a contract interpretation to the effect that his contract was one of federal employment and that he had

been appointed as a federal employee in the civil service (R4, 52207, tab 20).

10. Appellant's claim was denied by contracting officer's decision dated 9 November 1998. Insofar as pertinent the contracting officer stated as follows (R4, 52207, tab 21):

> 1) The Contract is entered into pursuant to statutory authority (pub. L. 105-119, 11[1] Stat. 2472) provided to the Department of Commerce for "employment of Americans and aliens by contract abroad."
>
> 2) As stated on its cover page, the Contract is a personal services contract"; i.e. one which establishes an employer-employee relationship between the Government and the contractor (cf. FAR 37.104).
>
> 3) Also as stated on the cover of the Contract, the Contract does not make the contractor a "direct-hire employee" (i.e., a member of the statutory civil service or Foreign Service personnel systems).
>
> 4) While the Embassy has used the terms "appointment" and "position" in referring to your contract employment, it is clear that you have not been appointed to a civil service or Foreign Service position [citations omitted].
>
> 5) The Contract, whose term has now expired, is valid and effective in accordance with its terms.

Appellant filed an appeal of this decision, and it was docketed by the Board as ASBCA No. 52040.

11. By letter to the contracting officer dated 9 February 1999, appellant asserted a second claim, contending that he was entitled to reformation or rescission of his contract (1) due to mistakes and misrepresentations regarding the nature of the contract and compensation and (2) due to the improper procedures used by the Government to solicit and award the contract. Appellant requested, *inter alia,* that an option clause be added to his contract and that it be immediately exercised in his favor; he also sought increased annual and sick leave, a higher salary rate, hardship differential, a cost of living adjustment, and medical and life insurance premium reimbursement and housing expenses. (R4, 52207, tab 22)

12. Appellant's second claim letter refers to a conversation between appellant and the personnel officer at the Embassy, prior to appellant's execution of the contract, to the effect that compensation under the contract was not negotiable (*id.*, at 6). The Government's offer, which appellant accepted and signed, also stated that appellant was not entitled to housing benefits (finding 4). Appellant's claim letter does not allege that the contracting officer misrepresented the nature or amount of his compensation.

13. The contracting officer issued a decision dated 8 April 1999, which for the most part denied appellant's claim. The contracting officer conceded that appellant was entitled to a reimbursement for certain annual health insurance costs pursuant to the contract (finding 8), and requested documentation to support the claim. As far as this record shows, appellant provided this documentation and the Government reimbursed these insurance costs pursuant to the contract.

14. Appellant also filed an appeal of this contracting officer's decision, and it was docketed by the Board as ASBCA No. 52207.

15. The US&FCS Operations Manual, Chapter 523.1, Revised 03/96, provides in pertinent part as follows (app. R4 supp., 52207, tab 35):

523.1 Personal Service Contracts

SECTION 1. OBJECTIVE

To establish procedures for Personal Service Contracts (PSCs)

SECTION 2. GENERAL DESCRIPTION

A. Definition

A PSC is a contract with an individual which makes the contractor appear to be, in effect, a U.S. Government (USG) employee. A PSC contractor is, among other things, subject to the relatively continuous supervision and control of a USG employee . . . .

B. Authority

US&FCS's authority to enter into domestic and foreign PSCs is based upon ITA's annual appropriation law which is subject to possible revision each fiscal year.

Specific authorities/requirements of Federal Acquisition Regulations, 48 CFR 6.1 et seq. and 48 CFR 37.1 apply. Overseas PSCs are subject to regulations in 3 Foreign Affairs Manual (FAM) 171.4 through 179.2, and 3 FAM 926.

C. Policy

PSCs are not covered by any benefit plan or law administered by the Office of Personnel Management (OPM), e.g., programs such as annual and sick leave, health and life insurance and retirement plans. . . .

DECISION

By its very terms, appellant's contract was identified as a personal services contract. The contract expressly provided that appellant was not a direct hire employee (findings 6, 7). Insofar as pertinent, the FAR provides as follows with respect to personal services contracts:

37.104 Personal services contracts.

(a) As indicated in 37.101, a personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.

> (b) Agencies shall not award personal services contracts unless specifically authorized by statute (e.g. 5 U.S.C. 3109) to do so.

The Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-32 (September 30, 1996) provided annual appropriations for the Department of Commerce, International Trade Administration activities for fiscal year 1997 as follows:

> *For necessary expenses for international trade activities of the Department of Commerce provided for by law, and engaging in trade promotional activities abroad, including* expenses of grants and cooperative agreements for the purpose of promoting exports of United States firms, without regard to 44 U.S.C. 3702 and 3703; full medical coverage for dependent members of immediate families of employees stationed overseas and employees temporarily posted overseas; travel and transportation of employees of the United States and Foreign Commercial Service between two points abroad, without regard to 49 U.S.C. 1517; *employment of Americans and aliens by contract for services; - -* (Emphasis added)

The Continuing Appropriations Act, 1998, Pub. L. No. 105-46, 111 Stat. 1153 (September 30, 1997) generally provided that pending further Congressional action, fiscal year 1998 funds would be available under the same authority and conditions that governed fiscal year 1997 appropriations. The Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat. 2440, 2471, 2472 (November

26, 1997), also recited verbatim the above appropriation provision.

In accordance with the US&FCS Manual, this legislative appropriation language is the agency's authority for personal service contracting (finding 15). The contracting officer's decision also apparently relied on this language as authorizing personal service contracting (finding 10). We agree that the ITA annual appropriation legislation provides the statutory authority for the award of appellant's personal services contract as contemplated by the FAR.

We conclude that appellant's personal services contract was authorized by statute, provided for the use of appropriated funds and was subject to the FAR and those acquisition procedures pertinent thereto.[3] It also follows that we have jurisdiction over this personal services contract dispute under the CDA, 41 U.S.C. §§ 601 *et seq.* We now proceed to address the merits of the Government's summary judgment motion.

The law governing summary judgment is familiar. As we recently stated in *Elam Woods Company, Inc.,* ASBCA No. 52448, 2001 LEMS 32 (February 15, 2001):

> Summary judgment is properly granted when there is no genuine issue of material fact, and the movant is entitled to judgment as a matter of law. The moving party bears the burden of establishing the absence of any genuine issue of material fact [citations omitted].
>
> . . . .

> The burden on the movant is to point out that there is an absence of evidence to support the nonmoving party's *case. Sweats Fashions, Inc. v. Pannill Knitting Co.,* 833 F.2d 1560, 1563 (Fed. Cir. 1987). Once the moving party has met its burden, the nonmovant must proffer countering evidence sufficient to create a genuine factual dispute. Conclusory statements, denials, or arguments do not raise a genuine issue of fact. *Applied Companies v. United States,* 144 F.3 d 1470, 1475 (Fed. Cir. 1998); *Paragon Podiatry Laboratory, Inc.* v. *KLM Laboratories, Inc.,* 9 84 F.2d II 82, 1190 (Fed. Cir. 1993). A genuine issue of material fact arises when the nonmovant presents sufficient evidence upon which a reasonable fact finder, drawing the requisite inferences and applying the applicable evidentiary standard of proof, could decide the issue in favor of the nonmovant. *Anderson v. Liberty Lobby, Inc., supra,* at 254-5 5; *C. Sanchez and Son, Inc. v. United States,* 6 F.3d 1539, 1541 (Fed. Cir. 1993).

The movant will be entitled to summary judgment if the nonmovant is unable to provide evidence of all elements esssential to the establishment of its *prima facie case. Dairyland Power Cooperative v. United States,* 16 F.3d 1197, 1202 (Fed. Cir. 1994).

Appellant seeks to rescind or void his written contract to obtain the fair market value of the services he rendered. In order to obtain the equitable remedy of rescission, it is well settled that appellant must prove mutual mistake, fraud, or illegality in the formation of the contract. *Dow Chemical Co. v. United States,* 226 F.3d 1334 (Fed. Cir. 2000). As stated in *Dairyland, supra,* at 1202, in order to establish mutual mistake, a party must show the following:

> (1) the parties to the contract were mistaken in their belief regarding a fact;
>
> (2) that mistaken belief constituted a basic assumption underlying the contract.
>
> (3) the mistake had a material effect on the bargain; and
>
> (4) the contract did not put the risk of the mistake on the party seeking reformation.

Appellant has failed to offer evidence -- as opposed to argument -- to support these four elements. Appellant has failed to adduce any evidence to the effect that he and the contracting officer erroneously believed that he was hired as a federal employee under the civil service laws. Indeed, the contract that both parties signed stated clearly to the contrary. Nor did any conceivable misunderstanding on appellant's part have a material effect on the bargain since appellant accepted his position at a stated compensation which was non-negotiable and which clearly did not include reimbursement for housing expenses (finding 12). Appellant may not recover on the ground of mutual mistake.

Nor has appellant alleged any fraud in its claim and may not recover on this basis. With respect to allegations regarding the formation of the contract, we note that the Embassy contracting officer who executed the contract was authorized to do so. The record, however, reflects that the Government failed to follow the FAR in a number of respects in the solicitation and award of this contract (finding 3). Assuming, *arguendo,* that these regulations were promulgated for the benefit of contractors, we must conclude that appellant participated in, and benefited from the acquisition process to which it now objects and must be

considered as having unclean hands so as to be precluded from obtaining the equitable remedy. *Promac, Inc. v. West,* 203 F.3d 786, 789 (Fed. Cir. 2000).

Alternatively, appellant seeks to reform the contract by changing its terms and conditions to afford him compensation that his written contract denied him. Generally, such a remedy may be available under certain circumstances where the parties' writing fails to express their actual agreement, see RESTATEMENT (SECOND) OF CONTRACTS, § 155 (1981); or where an authorized party makes a unilateral mistake of a material fact, *i.e.,* a bid mistake, during the formation of the contract which the other authorized party had reason to know and failed to- seek correction thereof, see *Giesler and Coniglio v. United States,* 232 F.3d 864 (Fed. Cir. 2000); or where an authorized party misrepresents the contents or effect of a writing prior to its execution upon which the other party justifiably relied and which induced said party to assent to the writing, see RESTATEMENT (SECOND) OF CONTRACTS, § 166 (1981).

We have reviewed the record and find no evidence -- as opposed to argument -- that would support *a prima facie* case for contract reformation on any of these theories. Appellant fails to suggest, let alone provide any evidence to the effect that the Embassy contracting officer misrepresented appellant's compensation which reasonably induced appellant to sign his contract. Appellant accepted the Government's written terms and conditions, and executed his personal services contract, with full knowledge of their contents in all material respects. With respect to appellant's claim regarding the renewal of his contract, appellant has not shown that an options clause was required by law to be

included in his contract and/or that the Government was otherwise obligated to renew his contract.

For the foregoing reasons, we conclude that appellant may not recover on his claims and that the Government is entitled to judgment as a matter of law. The appeals are denied.[4]

Dated: 26 March 2001

/s/ Jack Delman
JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

/s/ Mark N. Stempler
MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

/s/ Eunice W. Thomas
EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

NOTES

1 Appellant also filed a motion for protective order, objecting to the inclusion in the Government's Rule 4 file of two personnel forms completed by appellant - "SF85,

Questionnaire for Non Sensitive Positions" (R4, 52207, tab 3), and "SF86, Questionnaire for National Security Positions" (*id.*, tab 17) -- on the grounds that they contain information that is confidential and/or irrelevant to these appeals. We agree that these personnel forms are not relevant to these appeals. We hereby strike them from the record and return them to the Government (under separate cover).

2 Mr. Yen was an authorized contracting officer for the Department of State, U.S. Embassy Beijing. He was authorized to enter into this contract on behalf of the Department of Commerce pursuant to 48 CFR 601.603-70(a)(1)(ii).

3 We note that in a number of unpublished GAO opinions, the GAO has dismissed protests filed by appellant, stating that the enabling statutory language above - "employment... by contract for services" -- envisions *employment* actions under federal employment laws rather than personal service contracts under the FAR. *Arthur Lees-Protests and Reconsideration Requests, B-281181.3 et seq.* (May 20, 1999). *Arthur Edward Lees-Reconsideration,* B-281181.5 (February 11, 2000) (attached to the Government's motion). We have reviewed these opinions and are not persuaded to follow them. We are not persuaded that the use of the term "employment" in this context necessarily invokes appointments under federal civil service, foreign service or other federal employment laws or procedures. *See, e.g.* 5 U.S.C. § 3109 ("employment" of experts and consultants by contract is not an appointment under federal civil service laws).

[4] The Board is mindful that while appellant has already obtained considerable document discovery in these appeals it has not obtained all of the discovery it desires. Appellant has filed multiple sets of voluminous discovery (hundreds of interrogatories and document requests) and the Government has filed a motion for protective order related thereto. In view of our disposition of these appeals, we need not address these motions. We are not persuaded that appellant's requests for Government information, even if granted in total, would reasonably lead to the discovery of evidence, particularly as to appellant's own conduct or justifiable reliance, that would be necessary to establish *a prima facie* case on any of the equitable theories it has advanced.

APPENDIX C

L/BA ID:7035161547 APR 06 '99 17:18 No.008 P.04

April 8, 1999

VIA FACSIMILE (86.28) 524-0214 & MAIL
Arthur E. Lees
Li Ming
12 Hao Dingsidong Erdanyuan 10 Hao
Kexue Xiaoqu Keyuan Lu
Chengdu, Sichuan PRChina 610041
Tel. (8628) 524-8534

Re: Claim Under Contract Disputes Act
Contract No. S-CH500-98-0004

Dear Mr. Lees:

This responds to your letter (hereinafter "Claim Letter") dated February 9, 1999, which requests a contracting officer's final decision on a series of claims presented therein.

I would note first of all that your request (Claim Letter, at p. 11 n.20) that my decision respond with particularity to each and every allegation contained in the 60-odd numbered paragraphs and subparagraphs of your 11-page claim letter goes well beyond the requirements of FAR 33.211(a)(4). Nevertheless, for clarity and ease of reference, I will reference your claim letter with particularity as appropriate. Paragraphs and subparagraphs and allegations within such paragraphs and subparagraphs that are not responded to are deemed irrelevant and immaterial.

Response to Statement of Facts and Allegations

Your Paragraph 1 appears essentially correct. As stated on the cover page Contract No. S-CH500-98-0004 is a Personal Services Contract between the U.S. Department of Commerce and Arthur E. Lees.

Your Paragraph 2 sets forth conclusions of law that would not require a responsive pleading in an Answer to a Complaint. To the extent these allegations are relevant to the claims presented, they are addressed below.

Your Paragraph 3 sets forth conclusions of law that would not require a responsive pleading in an Answer to a Complaint. To the extent these allegations are relevant to the claims presented, they are addressed below.

Your Paragraph 4 identifies a Department of State document called "Indexes of Living Costs Abroad, Quarters Allowances, and Hardship Differentials" and makes certain statements about its contents and how it is used. To the extent these allegations are relevant to the claims presented, they are addressed below.

Your paragraphs 5 and 6 [sic] identifies two Department of Commerce telegrams, and makes certain representations as to their contents. To the extent these allegations are material to the claims presented, they are addressed below.

The first sentence of your paragraph 7 is false in contending that authorization from the Department of Commerce to award a contract with options to renew for up to five years compelled the inclusion of such an option provision in the contract under which your claims are presented. The contract in fact contained no such option for renewal and

expired by its terms on September 30, 1998.

The allegations of your paragraph 8 are rejected to the extent it is asserted that procedures followed in the solicitation and award of your contract entitle you to any compensation or benefits not specified in the terms of that contract.

The allegations of your paragraph 9 are accepted to the extent they allege that you received all compensation and benefits provided for under the terms of Contract No. S-CH500-98-0004.

The allegations of your paragraphs 10 and 11 are accepted to the extent they are consistent with the actual terms of Contract No. S-CH500-98-0004, which is itself the best evidence of its contents.

The allegations of your paragraph 12 are accepted to the extent they characterize the contents of the document cited and are consistent with the actual terms of that document, which is itself the best evidence of its contents. However, regardless of the policy stated in an Embassy Beijing internal memorandum, you have no legal entitlement to any benefit not specified in Contract No. S-CH500-98-0004

The allegations of your paragraph 13 and its subparagraphs are generally rejected. Your claim to have been highly qualified by virtue of your prior work experience for the Commercial Representative contract position you occupied under Contract No. S-CH500-98-0004 is incorrect. Your resume demonstrates little or no practical business experience. While your experience [sic] international business law was not entirely irrelevant, it is not a primary qualification for a Commercial Representative. In any event, the level of compensation provided under Contract No. S-

CHS00-98-0004 was established by the Government's offer and your acceptance. It is not subject to retroactive negotiation or redetermination.

The allegations of your paragraph 14 and its subparagraph are deemed irrelevant. The level of compensation provided under Contract No. S-CH500-98-0004 was established by the Government's offer and your acceptance. It is not subject to retroactive negotiation or redetermination.

The allegations of your paragraphs 15, 16 and 17 and its subparagraphs are deemed irrelevant. The level of compensation provided under Contract No. S-CH500-98-0004 was established by the Government's offer and your acceptance. It is not subject to retroactive negotiation or redetermination. I would note also that doctrines of estoppel are rarely invoked against the Government, and certainly not to permit a contractor to recover on inchoate and undisclosed expectations of compensation in excess of that provided by an express contract.

The allegations of your paragraph 18 are substantially false. Provision for overseas allowances for career United States Government employees who are assigned abroad are established in Federal law and published regulations, so the Government does not have superior knowledge of the existence of such allowances. Moreover, such knowledge was irrelevant to the contract solicitation. The United States Government does not provide overseas allowances or differentials to individuals who are hired locally at posts abroad, whether in civil service or Foreign Service positions or under personal services/employment contracts.

The allegations of your paragraph 19 and its subparagraphs are false and based on circular reasoning. You accuse the

Government of bad faith for not allowing you additional compensation and benefits. But plainly your entitlement to such compensation and benefits cannot be based on the Government's failure to grant them. I would also note specifically that "Executive Branch policy," even if applicable to the present contract, is not a basis for legal entitlement.

The allegations of paragraph 20 and its subparagraphs are rejected except that, per subparagraph 20.3 you are entitled under Clause IV.E of Contract No. S-CHS00-98-0004 to reimbursement for 50% of actual costs of annual health insurance, provided that such costs may not exceed the maximum U.S. Government contribution for direct-hire personnel. Your previous request for reimbursement of such costs, dated September 5, 1998, was inadvertently overlooked and is addressed below.

Response To Requests for Relief

All requests for relief in your paragraphs 21 through 26, 28 through 30 and 32 are denied. The claim in your paragraph 27 for $932.71 in reimbursement for health insurance premiums will be allowed to the extent you provide me with documentation showing that you have incurred actual out of pocket costs for health insurance premiums during the effective period of your contract. Your September 5, 1998 claim includes no documentary support and appears to claim payment for that portion of your health insurance premium paid by the Government as your former employer. I do not view premiums paid by the Government as costs for which you may claim reimbursement. In view of the delay in communicating to you the need for supporting documentation, I will allow you interest on the amount ultimately found due to you from the date of your original

request (i.e., Sept. 5, 1998). The request in your paragraph 31 for a decision within 60 days is met by issuance of this letter decision. Any allegation or request not otherwise addressed in this decision should be deemed denied or rejected.

This is the final decision of the Contracting Officer. You may appeal this decision to the Armed Services Board of Contract Appeals, Skyline Six, 5109 Leesburg Pike, Falls Church, VA 22041-3206. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the Armed Services Board of Contract Appeals and provide a copy to the Contracting Officer from whose decision the appeal is taken, The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. With regard to appeals to the Armed Services Board of Contract Appeals, you may, solely at your election, proceed under the Board's small claims procedure for claims of $50,000 or less or its accelerated procedure for claims of $100,000 or less. Instead of appealing to the Armed Services Board of Contract Appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision.

Sincerely yours,

/s/ John A. Smith
John A. Smith
Contracting Officer

APPENDIX D

November 9, 1998

Mr. Arthur [sic] lees
c/o Timothy Purnell, Esq.
7519 Campbell Court
Manassas, VA 20109-2902

Re: Contract No. S-CH500-98-0004

Dear Mr. Lees:

This responds to your memorandum dated September 6, 1998 addressed to Michael Yen, Contracting Officer, American Embassy Beijing. Pursuant to Clause XII of the Contract No.SCH500-98-0004 (hereinafter "the Contract") and the Contract Disputes Act, you have presented a "demand for interpretation of the contract terms."

You assert that the Contract "is not an independent contractor contract" but rather "is a Government contract with me as a direct hire Federal employee." The Government responds to your contentions as follows:

1) The Contract is entered into pursuant to statutory authority ([sic] pub. L. 105-119, 11 Stat. 2472) provided to the Department of Commerce for "employment of Americans and aliens by contract abroad."

2) As stated on its cover page, the Contract is a "personal services contract"; i.e., one which establishes an employer-employee relationship between the Government and the contractor (cf. FAR 37.104).

3) Also as stated on the cover page of the Contract, the Contract does not make the contractor a "direct-hire

employee" (i.e., a member of the statutory civil service of Foreign Service personnel systems).

4) While the Embassy has used the terms "appointment" and "position" in referring to your contract employment, it is clear that you have not been appointed to a civil service or Foreign Service position. See [sic] McGarrigle v. United States Post Office, 904 F.2d 687 (Fed. Cir. 1990); Bevans v. Office of Personnel Management, 900 F.2d 1558 ([sic] fed. Cir. 1990); Horner v. Acosta, 803 [sic] f.2d 687 (Fed. Cir. 1986).

5) The Contract, whose term has now expired, is valid and effective in accordance with its terms.

This is the final decision of the Contracting Officer. You may appeal this decision to the Armed Services Board of Contract Appeals, Skyline Six, 5109 Leesburg Pike, Falls Church, VA 22041 -3206. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the Armed Services Board of Contract Appeals and provide a copy to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. With regard to appeals to the Armed Services Board of Contract Appeals, you may, solely at your election, proceed under the Board's small claims procedure for claims of $50,000 or less or its accelerated procedure for claims of $100,000 or less. Instead of appealing to the Armed Services Board of Contract Appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision.

Sincerely yours,
/s/ *John A. Smith*
Contracting Officer

APPENDIX E

Matter of: Arthur Edward Lees – Protests and Reconsideration Requests

File: B-281181.3; B-281954.2; B-281954.3; B-282281

Date: May 20, 1999

DECISION

Arthur Lees protests the Department of Commerce's efforts to fill commercial representative positions at the U.S. Embassy in Beijing, China and at the U.S. consulates in Chengdu and Shenyang.[1] Lees complains that the agency is using employment procedures, rather than procurement procedures, to fill these positions and, therefore, that the agency's efforts fail to comply with various procurement laws and regulations which Lees asserts are applicable to these actions.

We dismiss the protests and deny the reconsideration requests.

The agency agrees that it has used procedures akin to employment procedures to fill the commercial representative positions. The agency explains that the specific statutory authority for the actions at issue expressly contemplates employment actions – not procurements of goods or services. Specifically, the agency refers to the following authorizing language within its appropriations act, which provides authority to expend funds for "necessary expenses for international trade activities of the Department of Commerce ... including ... employment of Americans and aliens by contract for services ...." Department of Commerce and Related Agencies Appropriations Act, Pub. L. No. 105-277, 112 Stat. 2681, 2681-77-78 (1998) (emphasis added).

Our Office has recognized that where the relationship between the government and a particular individual is one of employment, "the relationship ... is governed not by the procurement laws and regulations, but the employment and compensation laws." *Jeffrey H. Smith*, B-259499, Aug. 22, 1995 at n.1. Our Office's jurisdiction to consider bid protests is predicated on the existence of "a solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services." 31 U.S.C. §§ 3551-3552.

Here we view as significant the fact that the statutory language authorizing the actions at issue specifically authorizes "employment" actions. *Cf. Mary Jo McDonough*, B-270530, B-270530.2, Mar. 13, 1996, 96-1 CPD ¶ 154 at 2 (statue authorizing use of funds by contracting with individuals expressly provided that such individuals "shall not be regarded as employees of the United States"). Further, the legislative history shows that the agency's statutory authorization for "employment of Americans and aliens" was first introduced in the Department of Commerce's appropriations act for fiscal year 1983, and that, in enacting that legislation, both the House and Senate Reports on the Committee on Appropriations specifically recommended inclusion of authority for such "employment" of personnel. H.R. Rep. No.97-721 at 13 (1982); S. Rep. No.97-584, at 12 (1982). During related congressional hearings, the purpose of the proposed language regarding "employment" of personnel was stated to be for clarification of the agency's authority to "hire" personnel, and the following more specific explanation was provided:

> [The agency] often requires the use of narrators, demonstrators, receptionists, clerical, and facilities maintenance personnel who speak the language of the host country; are familiar with local practices and

> procedures; or who only need to be employed for a short period of time. In some cases, however, it is more advantageous to employ U.S citizens in the host country (generally members of an employee's family) because they have greater familiarity with American methods, and therefore, require less effort to train.

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1983: Hearings on Appropriations Act for 1983 Before the Subcomm. On the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies of the House Comm. on Appropriations, 97th Cong. 503, 506 (1982).

On the record here, we view the agency's actions to fill commercial representative positions in China as constituting employment of personnel, and find that such actions are not subject to the procurement statutes and regulations. Accordingly, Lees's various protests challenging the agency's efforts to fill these positions are not for consideration on the merits under our bid protest authority.

The protests are dismissed and the reconsideration requests are denied.

Comptroller General of the United States

---

1. Lees also seeks reconsideration of our decisions dismissing prior protests similarly challenging agency actions related to filling the commercial representative requirements. As explained today, the actions at issue are employment actions and, thus, not for consideration by this Office under our bid protest authority. Accordingly, there is no basis for our Office to consider either the prior protests or the reconsideration requests.

APPENDIX F

The Floyd Acceptances
Supreme Court Of The United States
74 U.S. 666; 19 L. Ed. 169; 7 Wall. 666
December, 1868, Term

. . . .

But the government is an abstract entity, which has no hand to write or mouth to speak, and has no signature which can be recognized, as in the case of an individual. It speaks and acts only through agents, or more properly, officers. These are many, and have various and diverse powers confided to them.

. . . .

When this inquiry arises, where are we to look for the authority of the officer?

The answer, which at once suggests itself to one familiar with the structure of our government, in which all power is delegated, and is defined by law, constitutional or statutory, is, that to one or both of these sources we must resort in every instance. We have no officers in this government, from the President down to the most subordinate agent, who does not hold office under the law, with prescribed duties and limited authority. And while some of these, as the President, the Legislature, and the Judiciary, exercise powers [*19] in some sense left to the more general definitions necessarily incident to fundamental law found in the Constitution, the larger portion of them are the creation of statutory law, with duties and powers prescribed and limited by that law. It would seem reasonable, then, that on the question of the authority of the Secretary of War to accept bills of exchange, we must look mainly to the acts of Congress.

. . . .

As regards usage, it must occur at once that if there are instances in which the use of bills of exchange by the officers of government is authorized by law, as undoubtedly there are, the use of them in such cases, however common, cannot establish a usage in cases not [*20] so authorized. It may also be questioned whether the frequent exercise of a power unauthorized by law, by officers of the government, can ever by its frequency be made to stand as a just foundation for the very authority which is thus assumed.

. . . .

The usage here found is limited to specified classes of cases, and if authorized by law, can be no evidence of a usage in cases not so authorized. It cannot be held to support the allegation of a usage so general [*21] as to apply to any case in which the head of the department may see proper to use it.

. . . .

But the obligation resting on him to perform that duty, and his right and authority to effect such an object, is always open to inquiry, and if they be found wanting, or if they be forbidden by express statute, then the draft or acceptance is not binding on the government.

It cannot be maintained that, because an officer can lawfully issue bills of exchange for some purposes, that no inquiry can be made in any case into the purpose for which a bill was issued. The government cannot be held to a more rigid rule, in this respect, than a private individual.

. . . .

APPENDIX G

FEDERAL ACQUISITION REGULATIONS (FAR)

[Amended per FAC 97-01, effective 21 Oct 97]

Part 1 – Federal Acquisition Regulations System

. . . .

1.103 Authority.

(a) The development of the FAR System is in accordance with the requirements of the Office of Federal Procurement Policy Act of 1974 (Pub. L. 93-400), as amended by Pub. L. 96-83, and OFPP Policy Letter 85-1, Federal Acquisition Regulations System, dated August 19, 1985.

. . . .

1.602-1 Authority.

(a) Contracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings. Contracting officers may bind the Government only to the extent of the authority delegated to them. Contracting officers shall receive from the appointing authority (see 1.603-1) clear instructions in writing regarding the limits of their authority. Information on the limits of the contracting officers' authority shall be readily available to the public and agency personnel.

(b) No contract shall be entered into unless the contracting officer ensures that all requirements of law,

executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met.

. . . .

Part 2 – Definitions Of Words And Terms

. . . .

2.101 Definitions. As used throughout this regulation, the following words and terms are used as defined in this subpart unless (a) the context in which they are used clearly requires a different meaning or (b) a different definition is prescribed for a particular part or portion of a part.

"*Acquisition*" means the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

. . . .

"*Offer*" means a response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract. Responses to invitations for bids (sealed bidding) are offers called "bids" or "sealed bids;" responses to requests for

proposals (negotiation) are offers called "proposals;" responses to requests for quotations (negotiation) are not offers and are called "quotes." For unsolicited proposals, see Subpart 15.5.

. . . .

"*Shall*" denotes the imperative.

. . . .

Part 6 – Competition Requirements

. . . .

6.401 Sealed Bidding and Competitive Proposals. Sealed bidding and competitive proposals, as described in Parts 14 and 15, are both acceptable procedures for use under Subparts 6.1, 6.2 and, when appropriate, under Subpart 6.3. Contracting officers shall exercise good judgment in selecting the method of contracting that best meets the needs of the Government. If the choice is to use competitive proposals rather than sealed bidding, the contracting officer shall briefly explain in writing, which of the four conditions in paragraph (a) of this section has not been met. No additional documentation or justification is required.

(a) Sealed bids. (See Part 14 for procedures.) Contracting officers shall solicit sealed bids if --

(1) Time permits the solicitation, submission, and evaluation of sealed bids;

(2) The award will be made on the basis of price and other price-related factors;

(3) It is not necessary to conduct discussions with the responding offerors about their bids; and

(4) There is a reasonable expectation of receiving more than one sealed bid.

(b) Competitive proposals. (See Part 15 for procedures.)

(1) Contracting officers may request competitive proposals if sealed bids are not appropriate under paragraph (a) above.

(2) Because of differences in areas such as law, regulations, and business practices, it is generally necessary to conduct discussions with offerors relative to proposed contracts to be made and performed outside the United States, its possessions, or Puerto Rico. Competitive proposals will therefore be used for these contracts unless discussions are not required and the use of sealed bids is otherwise appropriate.

. . . .

Part 14 Sealed Bidding

. . . .

14.103-2 Limitations. No awards shall be made as a result of sealed bidding unless--

(a) Bids have been solicited as required by Subpart 14.2;

(b) Bids have been submitted as required by Subpart 14.3;

(c) The requirements of 1.602-1(b) and Part 6 have been met; and

(d) An award is made to the responsible bidder (see 9.1) whose bid is responsive to the terms of the invitation for bids and is most advantageous to the Government, considering only price and the price related factors included in the invitation, as provided in Subpart 14.4.

. . . .

14.408 Award.

14.408-1 General.

. . . .

(d)(1) Award is generally made by using the Award portion of Standard Form (SF) 33, Solicitation, Offer, and Award, or SF 1447, Solicitation/Contract (see 53.214). If an offer from a SF 33 leads to further changes, the resulting contract shall be prepared as a bilateral document on SF 26, Award/ Contract.

. . . .

Part 37 – Service Contracting
[Amended per FAC 97-01, effective 21 Oct 97]

37.000 Scope of part. This part prescribes policy and procedures that are specific to the acquisition and

management of services by contract. This part applies to all contracts for services regardless of the type of contract or kind of service being acquired. [This part requires the use of performance-based contracting to the maximum extent practicable and prescribes policies and procedures for use of performance-based contracting methods (see subpart 37.6).] .

. . .

Subpart 37.1–Service Contracts—General

37.101 Definitions.

. . . .

"*Service contract*" means a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply. A service contract may be either a nonpersonal or personal contract. It can also cover services performed by either professional or nonprofessional personnel whether on an individual or organizational basis. Some of the areas in which service contracts are found include the following:

. . . .

37.102 Policy.

. . . .

([d]) Non-personal service contracts are proper under general contracting authority.

([e]) Agency program officials are responsible for accurately describing the need to be filled, or problem to

be resolved, through service contracting in a manner that ensures full understanding and responsive performance by contractors and, in so doing, should obtain assistance from contracting officials, as needed.

([f]) Agencies shall establish effective management practices in accordance with Office of Federal Procurement Policy (OFPP) Policy Letter 93-1, Management Oversight of Service Contracting, to prevent fraud, waste, and abuse in service contracting.

. . . .

37.105 Competition in service contracting.

(a) Unless otherwise provided by statute, contracts for services shall be awarded through sealed bidding whenever the conditions in 6.401(a) are met, (except see 6.401(b)).

(b) The provisions of statute and Part 6 of this regulation requiring competition apply fully to service contracts. The method of contracting used to provide for competition may vary with the type of service being acquired and may not necessarily be limited to price competition.

. . . .

APPENDIX H

[Appellant's June 30, 2000 Response To Respondent's ASBCA Motion For Summary Judgment, pp. 4, 13, 17-21.]

I. The Commerce Department Lacked Proper Statutory Authority.

. . . .

D. Failure to Properly Delegate Authority (The Economy Act).

. . . .

E. Failure to Properly Delegate Authority (State Contracting Officers' Position Classification Limitation).[44] Foreign service positions are classified according to an "FP" system instead of a "GS" system, where an FP-1 is equivalent to a GS-15.[45] According to Commerce, the vacancy announcement informed candidates that the commercial representative position was equivalent to the grade of FP-5, step 6.[46] Commerce acknowledges that a State contracting officer executed Appellant's contract on behalf of Commerce.[47]

All contracting [sic] officers authority is circumscribed by the requirements set forth in the FAR and agency acquisition regulations that implement or supplement the FAR.[48] Contracting officers may bind the Government only to the extent of the authority delegated to them.[49] According to DoSAR 637.104-70[50] the delegation of personal services contracting authority for U.S. citizens at overseas posts for all State contracting officers has been subject, since 1993, to two important conditions applicable to Appellant's contract situation.

First, the State Department contracting officer's personal services contract authority was limited to Department of State personal services contractors.[51] Appellant was a Commerce personal services contractor. Therefore, the State contracting officer was not authorized (by restriction of his own department's acquisition regulations) to execute Appellant's contract.

Second, the State Department contracting officer's personal services contract authority was limited to positions classified in the equivalent grade of FP-9 or below. Appellant's commercial representative position was classified at the equivalent grade of FP-5, step 6, well above the level of the State contracting officer's delegated authority. Therefore, even if Commerce had some how properly delegated its procurement authority to State, Commerce failed to plan ahead sufficiently to ensure that the contracting officer who executed the contract actually had the authority to do so under his department's acquisition regulations.

As a matter of law, the State contracting officer could not bind the Government because the extent of authority delegated to him did not include executing a contract for a position classified at the equivalent grade of FP-5, step 6 on behalf of Commerce.[52]

---

44. Note: Appellant argues that the deficiencies alleged herein against Yen are the same for Smith. As such, Smith was not properly authorized to render valid contracting officer final decisions because he was not authorized to act on the underlying contract action. This is a defect in Smith's decisions which Appellant argues should be grounds for sustaining Appellant's appeals based upon [sic] Smiths lack of authority.

45. See Attachment 1 at 3 FAM 170, Appendix D. Agency officials use the Third Volume of the Foreign Affairs Manual 8100 Appendix A (3 FAM 170, Appendix D) to classify positions such as commercial representatives. Position classifications fall into the following five categories:

I. Procedural Clerical -- comparable to Foreign Service grades DD, CC and BB on the Extended Foreign Service Schedule and the equivalent Civil Service grades GS-01, GS-02 and GS-03 on the General Schedule.

II. Substantive Clerical -- comparable to Foreign Service grade AA on the Extended Foreign Service Schedule, class **FP-09** on the Foreign Service Schedule and the equivalent Civil Service grades GS-04 and GS-05 on the General Schedule.

III. Technical Support -- comparable to the Foreign Service classes **FP-09**, **FP-08** and **FP-07** and the equivalent Civil Service grades GS-05, GS-06 and GS-07.

IV. Administrative/Professional -- comparable to Foreign Service classes **FP05**, **FP-04** and **FP-03** and the equivalent Civil Service grades GS-09, GS-10, GS-11 and GS-12 on the General Schedule.

V. Expert and Consultant -- comparable to Foreign Service classes **FP-02** and **FP-01** and the equivalent Civil Service grades GS-13, GS-14 and GS-15 of the General Schedule.

46. Respondent's Statement of Material Facts as to Which There is No Genuine Dispute, Nos. 1 and 2 **[353]**.

47. Respondent's Motion for Summary Judgment, at p. 8 **[352]**.

48. FAR 1.101 states, "The Federal Acquisition Regulations System is established for the codification and publication of uniform policies and procedures for acquisition by all executive agencies. The Federal Acquisition Regulations System consists of the Federal Acquisition Regulation (FAR), which is the primary document, and agency acquisition regulations that implement or supplement the FAR."

49. FAR 1.602-1(a).

50. DoSAR 637.104-70 Delegation of Personal Services Contracting Authority For U.S. Citizens And Foreign Nationals At Overseas Posts states in pertinent part (emphasis added):

> (a) By memorandum of September 8, 1993, the Procurement Executive delegated to the Executive Directors of the Regional Bureaus and the International Organization Affairs the authority for personal services contracts for specified functions/categories of personal services contracts. A copy of the memorandum is included in the Appendix.
>
> (b) This authority may be redelegated by the Executive Directors to the Deputy Executive Directors, without power of redelegation.
>
> (c) The delegation is subject to the following conditions:
>
> (1) This delegation is limited to the statutory authority under 22 U.S.C. 2669(c)(2). [sic] (2) This authority applies only to posts in the Bureau's geographic region, or in the case of International Organization Affairs, to missions to international organizations.
>
> (2) This authority is for personal services contracts with U.S. citizens at the FP-09 equivalent level or below in Procedural Clerical, Substantive Clerical, and Technical Support as defined in the Work Evaluation Guidelines in 3 FAM 170 Appendix D. Requests for delegation of

American personal services contract authority at higher work and class levels shall be referred by the Bureau to the Office of the Procurement Executive through the Office of Employee Relations.

(3) * * * [personal services contracts with foreign nationals and third country nationals]

(4) **Personal services contract authority is limited to Department of State personal services contractors** including personal services contractors who provide overseas administrative support services to agencies serviced by State under the FAAS System. **In rare circumstances, it may be possible to use the Department of State's authority for personal services contracts awarded on behalf of other agencies. Posts shall contact A/OPE prior to award of any personal services contract proposing to use the Department of State's authority.**

51. DoSAR 637.104-70(c)(4) indicates a possible exception, but there is no evidence in the record that this exception might apply to any FCS PSCs. Any exception would be inapplicable to the Appellant because this condition is subject to the other condition restricting the delegation of authority to positions in the equivalent grade of FP-9 or below. Appellant's position was classified at the equivalent grade of FP-5, step 6, well above the delegation ceiling.

52. Looking at the record it is clear that in FY 1998 alone **[116]**, State contracting officers ignored the limits on their authority at least 16 times, including Appellant's contract, routinely signing USFCS PSC contracts and renewals. Viewed in the context of all PSCs contracted at posts each year world wide, State contracting officers must be signing personal services contracts constituting millions of dollars in unauthorized commitments.

APPENDIX I

[Respondent's Memorandum of Law, dated March 15, 1999, Protest of Arthur Edward Lees, B-281954, pp. 6-12. Entered into the ASBCA record at Tab 25.]

MEMORANDUM OF LAW

I. THE DEPARTMENT OF COMMERCE RESPECTFULLY REQUESTS THAT THE GENERAL ACCOUNTING OFFICE DISMISS THIS PROTEST FOR LACK OF JURISDICTION.

The protested Vacancy Announcement was issued by the Personnel Office of the United States Embassy in Beijing, People's Republic of China, and the protested contracts were signed on behalf of the United States Government by John A. Smith, a General Services officer at Embassy Beijing. These offices are under the control of the Department of State, but the Vacancy Announcement and resulting contracts serve the U.S. & Foreign Commercial Service, which is part of the Department of Commerce.

Pursuant to GAO Rules of Bid Protest Procedures, Section 21.5, the U.S. Department of Commerce, International Trade Administration (ITA), requests that the above-captioned protest filed by Arthur Edward Lees be dismissed for the reasons outlined below.

The U.S. Foreign Commercial Service, a division of ITA, has a requirement for a Commercial Representative for its office located at the U.S. Consulate in Chengdu, People's Republic of China. The Department requested the U.S. Department of State, as its servicing agency, to fulfill this requirement. The Department of State advertised the

requirement utilizing personnel hiring procedures and published a vacancy announcement on January 5, 1999.

GAO's bid protest jurisdiction stems from the Competition in Contracting Act of 1984 ("CICA") which limits GAO's jurisdiction to deciding protests which concern alleged violations of a procurement statute or regulation. 31 U.S.C. § 3552 (Supp. 11 1996); *Logistical Support, Inc.*, B-244155, Sept. 16, 1991, 91-2 CPD para. 247.

31 U.S.C. § 3552 states in pertinent part as follows:

> **§ 3552. Protests by Interested Parties Concerning Procurement Actions**
>
> A protest concerning an alleged violation of a procurement statute or regulation shall be decided by the Comptroller General if filed in accordance with this subchapter.

31 U.S.C. § 3551 defines a "protest" as follows:

> **§ 3551. Definitions**
>
> In this subchapter:
>
> (1) The term "protest" means a written objection by an interested party to any of the following:
>
> (A) A solicitation or other request by a Federal agency for offers for a **contract for the procurement of property or services.**
>
> B) The cancellation of such a solicitation or other request.

> (C) An award or proposed award of such a contract.
>
> (D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.
>
> (Emphasis added)

Thus, GAO's role in resolving bid protests must stem from a violation of a **procurement** statute or regulation (emphasis added).

Protestor has set forth various theories in its protest, ranging from ITA's lack of statutory authority to enter into a personal services contract to failure to follow Federal acquisition rules and regulations. First Protest Letter at pp. 3-9. All challenges, however, rest on the supposition that Commerce's requirement can only be met through an acquisition or procurement as defined by Federal acquisition rule and regulation.

Despite protestor's numerous allegations of a violation of procurement regulations, the subject matter of this protest is simply not a "procurement" as that term is encompassed under the meaning of Federal acquisition rules and procedures and GAO's bid protest authority. Rather, the resulting "contract" contemplated by the vacancy announcement issued by the State Department is in fact an "employment" agreement/contract. An examination of the statutory language contained in ITA's annual Appropriations Act, the source of ITA's authority to enter into such a contract, reveals quite plainly that employment, rather than the procurement or acquisition of services, is contemplated.

ITA's annual Appropriations Act provides the following language:

> "For necessary expenses for international trade activities of the Department of Commerce provided for by law, and engaging in trade promotional activities abroad, including expenses of grants and cooperative agreements for the purpose of promoting exports of United States firms, without regard to 44 U.S.C. 3702 and 3703; full medical coverage for dependent members of immediate families of employees stationed overseas and employees temporarily posted overseas; travel and transportation of employees of the United States and Foreign Commercial Service between two points abroad, without regard to 49 U.S.C. 1517; employment of Americans and aliens by contract for services, rental of space abroad for periods not exceeding ten years and expenses of alteration, repair, or improvement purchase or construction of temporary demountable exhibition structures for use abroad ... purchase of passenger motor vehicles for official use abroad..." (Emphasis added)

Significantly, the Appropriations Act does not state that funds are to be expended for the procurement of a contract for services. Rather, the language specifically uses the term "employment," implying an employer-employee relationship as opposed to a Government personal services procurement contractor relationship. In fact, the Appropriations Act language specifies use of appropriated funds for the purchase of other items such as exhibition structures and passenger motor vehicles. Surely, if acquisition or procurement of personal services was intended, the language would have so provided.

The legislative history behind the cited language clearly shows that ITA is specifically authorized to "employ" individuals by contract for services as opposed to "procuring" such services. Both the House and Senate reports on the Committee on Appropriations recommended inclusion of the specific language ("employment of Americans and aliens by contract for services abroad") rather than the "procurement" or "acquisition" of the services. H.R. Report No. 97-721, 97 th Cong., 2d Sess. 13; S. Report No. 97-584, 97th Cong., 2d Sess. 12. Finally, in hearings before a Subcommittee of the House of Representatives Committee on Appropriations, the justification for inclusion of the cited language repeatedly refers to the need to "hire" Americans and aliens by contract and that it was "more advantageous to 'employ' U.S. citizens in the host country." Hearings Before a Subcommittee of the H.R. Comm. On Appropriations, 97th Cong., 2d Sess. 503, 506 (1983).

Recently, in *Mary J. McDonough*, 96-1 CPD para. 154, GAO held that it had bid protest jurisdiction over a procurement for a personal services contract by the U.S. Agency for International Development (AID). In *McDonough*, however, GAO held that it had jurisdiction over the protest as it concerned a "contract for the procurement of services." *Id.* at 6. GAO reasoned that AID's statutory authority, section 636(a)(3) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2396(a)(3), provided the requisite statutory authority to enter into contracts for personal services. AID's statutory authority, however, specifically allows for the expenditure of appropriated funds for "contracting with individuals for personal services abroad. "It does not state that AID has authority to enter into an "employment" contract as ITA's Appropriations Act language specifically directs. In fact, AID's statutory language specifically states that services

procured under this provision do not create an employer employee relationship.

Furthermore, there is ample authority holding that not all contracts are procurement contracts governed by CICA. In case law interpreting whether a claim is subject to the Contract Disputes Act of 1978, 41 U.S.C. § 602, both the Court of Federal Claims and the Court of Appeals for the Federal Circuit have held that not all contracts are necessarily procurement contracts. See *Institut Pasteur v. United States*, 814 F.2d 624 (Fed. Cir. 1987) (contract's primary function was the facilitation of the transfer of research materials among scientists, not the procurement of property or services); *Northern Cheyenne Tribe v. United States*, 8 Cl. Ct. 596, 600 (1985) (contracts between the Bureau of Indian Affairs and the Indian Reservation Districts are not procurement oriented contracts, but grant or sociological type contracts not subject to CDA); *Lucas v. U.S.*, 37 Cont. Cas. Fed. (CCH) para. 76,269, (winning a design competition may create a contract, but such a contract does not constitute a procurement covered by the Contract Disputes Act).

As the express statutory authority on which ITA's requirement is based authorizes an employment, rather than a procurement contract, GAO lacks the requisite jurisdiction to hear this protest. Finally, as all of protestor's arguments are based on procedural requirements applicable only to Federal procurements, protestor fails to state a valid basis for protest and therefore its protest must be dismissed.